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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN MICHAEL PIEPOLI II, Defendant and Appellant.	B260138 (Los Angeles County Super. Ct. No. GA088733)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed in part; reversed in part and remanded.

Jennifer M. Hansen; and Verna Welfald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant John Michael Piepoli II of first degree murder (Pen. Code, § 187, subd. (a); count 1),[1] attempted second degree robbery (§§ 664, 211; count 2), and conspiracy to commit robbery (§ 182, subd. (a)(1); count 3). The jury found true the special circumstance that the murder was committed while appellant was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)). The jury also found true the firearm and gang enhancements. The trial court sentenced appellant to life without parole (LWOP) plus 25 years to life on the firearm enhancement.[2]

Appellant makes several contentions on appeal: (1) His statements to police were improperly admitted because they were made without *Miranda*[3] warnings and were involuntary, and he should have been allowed to present evidence that he did not receive such warnings; (2) there was insufficient evidence to support the felony-murder special circumstance true finding, requiring reversal of the LWOP sentence; (3) his trial counsel was ineffective in failing to present the defense of duress; (4) the trial court erred in denying his postconviction *Marsden*[4] motion; and (5) it was cruel and unusual punishment to sentence a 19-year-old to LWOP.

We agree the evidence was insufficient as a matter of law to support the true finding on the special circumstance. Appellant's LWOP sentence must therefore be reversed. In all other respects, we affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Appellant received 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). The other gun and gang enhancements on count 1 were imposed and stayed. On count 2, the trial court imposed and stayed the mid-term of two years on the attempted robbery, and also imposed and stayed the remaining gun and gang enhancements. On count 3, the court imposed and stayed the mid-term of three years for the underlying felony robbery, and imposed and stayed the gang enhancement. All of the stays were pursuant to section 654.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[4] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

FACTS

Robbery and Shooting

On the afternoon of January 15, 2013, 21-year-old Zane Goldstein (Zane) took his older brother Zachary Goldstein (Zachary) with him to sell marijuana to a new buyer. When they conducted drug deals, Zane would drive his Jeep while Zachary rode in the backseat. The buyer would join Zachary in the back. After the buyer handed the money to Zane, Zachary would provide the marijuana.

At around 2:00 p.m., Zane drove to an apartment complex near the corner of Holliston Avenue and Maple Street in Pasadena, California. Kevin Cabrera (Cabrera) came out to the curb and directed Zane to park in an empty space in the carport. Zachary thought this seemed strange, but Cabrera said the neighbors were nosy. Peter Parra (Parra) sat crouched in the bushes. Zane pulled in and kept the Jeep's engine running. Cabrera got into the backseat with Zachary. At that point, Raymond Conchas (Conchas) came out from behind the front tire of the adjacent parked car. Conchas was holding a short, sawed-off shotgun aimed at Zane's window. Conchas said, "Don't move or I'll blast you." Zane immediately put the car in reverse and backed out of the driveway.

Zane drove a couple blocks, then stopped the car. He and Zachary screamed at Cabrera to get out of the car. Cabrera said, "Where is the weed at?" and "If you don't give me the weed, do you want your homie to get blasted[?]" Zachary tried to push Cabrera out of the car but Cabrera fought back, holding onto the driver's seat. Eventually, Cabrera was pushed out. A tan sedan then pulled up next to Zane's driver's side window. A shot was fired at Zane by someone in the other car. Zane died at the hospital from a gunshot wound to the head.

Police Investigation

Pasadena Police Officer David Duran searched Zane's Jeep after the shooting. A canister containing approximately one ounce of marijuana was found inside a bag. Two cell phones were also recovered. One belonged to Zane and the other belonged to Conchas. Officer Duran knew Conchas from previous contacts.

An examination of the text messages and phone log on Conchas's phone revealed how the drug deal was set up. Two days before the murder, on January 13, 2013, at 1:42 p.m., Conchas's phone received a text message from "White John" saying, "710-0431, . . . a white boy that sells weed. He lives near Connels [Restaurant]."[5] Conchas texted back, "What's his name and tell him I know who?" White John responded, "Zane. You know Rafa." Conchas responded, "Rafa from where," and White John responded, "He lives on Buckeye."

On the day of the murder, January 15, 2013, there was a two-minute phone call from Conchas to White John at 11:48 a.m. Conchas called White John again at 12:48 p.m. for 30 seconds. Conchas then texted Zane saying, "What's up my boy? This is Rafa. Homie Chris, how much for the half?" Zane responded, "150." Between 12:20 p.m. and 1:46 p.m. Conchas and Zane negotiated further on a price and Zane agreed to sell one ounce of marijuana for $290. They also agreed on the location for the sale.

At 2:06 p.m., Zane texted Conchas that he had arrived at the location and was waiting outside in his Jeep. Meanwhile, at 2:02, 2:10 and 2:39 p.m. there were missed calls from White John's phone to Conchas. At 2:11 p.m., White John texted Conchas saying, "What's good?"

Appellant's Interviews

At 5:30 a.m., the day after the murder, Pasadena Homicide Detectives William Broghamer, Keith Gomez and Grant Curry went to interview 19-year-old appellant at his father's house. All three officers wore suits and were armed. Detective Broghamer wore a recording device and the recorded interview was played for the jury. The interview lasted about an hour. Appellant told the detectives that his friend Michael Pena was using his phone to text Conchas who was going to try to "take weed" from Zane. The plan was for Conchas to call Zane and reference "Rafa," an associate known to Zane. When the buyer got into the car he would bully Zane, maybe with a knife, to take the

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[5] The phone number for the contact "White John" was appellant's cell phone.

marijuana. Appellant said the plan was to "take advantage of the guy," because he would not call the police to report that his marijuana had been stolen.

Following the interview in the house, appellant agreed to show the detectives where Michael Pena lived. After driving around to two locations without finding the house, appellant admitted that his friend's name was Ward Lacey (Lacey), not Michael Pena.[6]

Appellant then agreed to go with the detectives to the police station, where Detective Broghamer interviewed him again. The recorded interview, which began at 8:38 a.m., was played for the jury. Appellant began by stating, "I'm done with this lying bullshit . . . I'm ready to get to it." Appellant stated that he knew Conchas because appellant went to school with Conchas's sister Ruby. Conchas is part of the Northside Pasadena gang and controls the drug sales in northern Pasadena. Anyone who sells marijuana in his territory gets "taxed." Ruby told appellant about a month earlier that Zane "had an encounter" with Conchas because Zane refused to pay taxes. According to Ruby, Conchas told Zane, "[N]ext time I see you it's not going to be pretty."

Lacey used appellant's phone to text Conchas about stealing Zane's marijuana. Lacey had bought drugs from Zane before. Lacey had a mutual friend with Conchas, and gave Conchas Zane's number in exchange for a cut of the stolen marijuana. Appellant was also hoping to get some of the marijuana. After Conchas obtained Zane's information, Conchas "took control." Lacey told appellant that Conchas said, "I'm going to have one of my friends get in the car and basically kind of punk him for his weed and say hey, man, give me – give me the fucking dope." Conchas said if Zane did not provide the weed, then Conchas was going to pull a knife out and say, "Hey, give it to me." Nothing was ever said about bringing a gun or shooting Zane.

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[6] It appears that later the same day, appellant agreed to wear a microphone and speak with Lacey at a park. Afterward, Lacey was arrested. Lacey, Conchas, Cabrera and Parra were all charged as codefendants with appellant. Conchas, Cabrera and Parra were tried separately from appellant.

Twenty minutes into the interview, Detective Broghamer stopped the recording and left the room. The recording was started again at an unknown time during the conversation, and lasted another 12 minutes. Appellant became emotional and said that he and Lacey provided Zane's contact information to Conchas because Conchas threatened to shoot appellant and his family if he did not. Appellant said that he had been in Conchas's car when Conchas made the threat, and Conchas set a gun down between the two front seats as he spoke. Appellant said he was in fear of Conchas because "I know he has guns and I know he has people."

Gang Evidence

Pasadena Police Officer David Garcia testified as an expert on the Hispanic gang known as the Northside Pasadena gang. The gang has allegiance to the Mexican Mafia and claims the territory where the shooting occurred. Neither appellant nor Lacey are members of the gang. However, Conchas, Cabrera and Parra are all gang members with multiple gang tattoos. Conchas's gang moniker is "Little Duke" and his father goes by "Big Duke."

A tax is a fee that gang members charge for selling narcotics in the gang's territory. Hypothetically, there could be two consequences for someone acting as a "traveling marijuana salesman" in gang territory without permission. The first consequence could be a "soft candy green light," which is a form of discipline where one is physically assaulted by the gang for failing to pay taxes or breaking a gang rule. The second option is a "hard candy green light,"
which is basically a "death sentence." A gang member is ordered to kill someone who did something to the gang, crossed the gang or snitched. In Officer Garcia's opinion, a hypothetical mirroring the facts of this case sounded like a "classic . . . dope rip," where gang members lure a person to an area and then try to steal the person's narcotics because the person does not have permission to sell in that area. Gang members cannot show weakness when the victim tries to get away. It is not uncommon for gang members to solicit nongang members for information.

DISCUSSION

I. Statements to Police

Appellant contends that his statements to police were made while he was in custody and should have been excluded because he was not advised of his rights under *Miranda* prior to questioning. He also contends that he should have been allowed to present evidence that he was not given *Miranda* warnings. Finally, he contends that his statements should have been excluded for the additional reason that they were involuntary.

A. Relevant Proceedings

The trial court held an evidentiary hearing on appellant's motion to exclude his statements to police. The focus of the hearing was whether appellant was in custody at the time he made his statements. The prosecution called two witnesses: Detectives Duran and Broghamer.

Detective Duran testified that he used department resources to connect Conchas's cell phone, found in the back seat of Zane's Jeep, to appellant, who was listed in the phone as the contact "White John." Detective Duran passed this information on to Detective Broghamer, along with appellant's address in Pasadena.

On January 16, 2013, Detective Broghamer, along with Detectives Curry and Gomez, went to appellant's house at about 5:30 a.m., when it was "just getting light." Detective Broghamer was wearing a suit, badge, and tactical vest, and his firearm was visible on the right side of his body. The other detectives were similarly dressed.

Detective Broghamer knocked on the door, introduced himself, and asked if appellant's dog was a pit bull, joking, "I don't have to shoot it do I?" Appellant clarified that the dog was not a pit bull and tended to it. Detective Broghamer then stated, "Hey, John, we have some questions we need to ask you." Appellant responded, "Yeah, no problem." When appellant asked if he could put on a sweater because it was cold outside, Detective Broghamer suggested they all go inside in the house to avoid attracting attention. Appellant sat in the living room with the three detectives. The front door was not blocked.

Detective Broghamer told appellant that Zane had been shot and stated, "you're not in trouble but we need to know what you know so we can follow-up on our investigation . . . you have direct contact with people, okay." Appellant started to offer details about people involved in setting up the robbery. Detective Broghamer said, "If there is something you did, whatever, tell us now because that's the time to tell us, not when we go click click and drive down to the station, okay." One of the other detectives acknowledged that the situation was scary for appellant, stating, "it happens all the time where you know in the moment, it's scary, you know you got cops in your living room and I understand all that . . . I'd rather hear it from you now then later." Appellant said, "Go ahead give me questions." Appellant also said, he was unaware they would use a gun, and "they said at most they would pull out a knife to scare [Zane]"

Appellant agreed to give the detectives his cell phone. According to Detective Broghamer, appellant also agreed to drive around with the detectives to show them where Michael Pena lived, and then agreed to go to the police station. The interview at the station took place in the detective section interview room area.

Detective Broghamer began the recorded interview at the police station by saying, "I appreciate you coming down here, okay, and talking with me." Appellant provided a detailed account of the events surrounding the setup of the drug deal with Zane.

After Detective Broghamer left the room and returned to speak with appellant, appellant asked, "Am I going to be incarcerated today?" Detective Broghamer responded, "No. You came down here to talk to us. Okay. Tell me what you know. Remember you're—you're free to leave. You're not under arrest. Okay. You came down here to talk to me. And—and—you know, and I appreciate everything. But I—I—we're not posting guards on the door. You can get up and walk away. [¶] . . . [¶] You're not under arrest whatsoever. Okay. So, tell me. Tell me, John, what do you got to say, bub?" Appellant continued talking to the detective. Appellant was not arrested until several days later.

The trial court denied appellant's motion to exclude his statements, finding that appellant was not subjected to custodial interrogation.

At trial, during cross-examination of Detective Broghamer, defense counsel asked the detective whether he advised appellant that he had the right to remain silent. The trial court sustained the prosecutor's relevance objection. When defense counsel again asked, "Did you advise—," a sidebar was held. The prosecutor argued: "The legal basis for the conversation is not at issue before this jury, meaning the *Miranda* issue is not before the jury. The fact that whether or not he was in custody or not is irrelevant for the jury. The court has already ruled on that. [¶] I would ask for an admonishment to the jury that 'the legality of the admissibility of the statements is not before you.'" Defense counsel argued it was a factual issue, not a legal one. The trial court sustained the prosecutor's objection and admonished the jury: "Ladies and gentlemen, the legality of the admissibility of any statements are not before you."

B. No Miranda Warnings Required

As summarized in *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088–1089: "It is clear that advisement of *Miranda* rights is only required when a person is subjected to custodial interrogation. [Citation.] Custodial interrogation has two components. First, it requires that the person being questioned be in custody. Custody, for these purposes, means that the person has been taken into custody or otherwise deprived of his freedom in any significant way. [Citation.] Furthermore, in determining if a person is in custody for *Miranda* purposes the trial court must apply an objective legal standard and decide if a reasonable person in the suspect's position would believe his freedom of movement was restrained to a degree normally associated with formal arrest. [Citation.] The test for custody does not depend on the subjective view of the interrogating officer or the person being questioned. [Citation.] The only relevant inquiry is "'how a reasonable man in the suspect's shoes would have understood his situation.'" [Citation.] The second component of custodial interrogation is obviously interrogation. For *Miranda* purposes, interrogation is defined as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. [Citation.] In reviewing a ruling on the admissibility of a statement we must determine

independently, based on undisputed facts in the record and those properly found by the trial court, whether the challenged statements were legally obtained. [Citation.]"

Here, the trial court properly denied appellant's motion to exclude his statements to police because a reasonable person in appellant's position would not have believed his freedom of movement was restrained to a degree normally associated with a formal arrest.

With respect to the first interview at appellant's house, the detectives knocked on the door, and were dressed in suits and not full tactical gear, although their firearms could be seen. The interview took place inside appellant's living room, after appellant allowed the detectives to enter. The detectives were sitting down during the interview and did not block the front door. None of the detectives unholstered his gun. They did not accuse appellant of killing Zane, and they did not threaten appellant. The interview lasted an hour and appellant was not arrested at the end. The interview was recorded and played for the jury.

Appellant argues there was no evidence that he believed he was free to terminate the interview or to ask the detectives to leave his house. But the test is objective, so appellant's actual belief does not matter. "As the United States Supreme Court has instructed, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.'" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830, quoting *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.)

Appellant also argues the presence of three armed detectives was intimidating and created a police-dominated environment, such that *Miranda* warnings should have been given. But whenever a person is questioned by police officers about a crime, there is bound to be some pressure. This fact alone cannot serve as the basis for *Miranda* warnings. While it is true that appellant was outnumbered by the three detectives, they were not pointing their guns at appellant, he was not handcuffed, and they did not physically intimidate or restrain him.

With respect to the second interview at the police station, once again appellant was not in custody. While appellant argues he did not go to the station of his own volition

because the police drove him and he did not have transportation home, appellant made the choice, on his own volition, to allow the police to transport him to the station. (See *People v. Stansbury, supra*, 9 Cal.4th at pp. 831–832 ["A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody"].) Appellant was interviewed by Detective Broghamer, who had interviewed him at his house. The interview was recorded and played for the jury. And appellant was told that he was free to leave and would not be arrested.

Because we conclude that appellant was not in custody, we need not reach the second component regarding whether appellant was interrogated within the meaning of *Miranda*. (*People v. Mosley, supra*, 73 Cal.App.4th at p. 1091 ["The police may question a suspect without violating any principles set forth in *Miranda* as long as the person being spoken to is not in custody"].)

C. No Error in Excluding Evidence of Absence of Miranda Warnings

In his supplemental brief, appellant claims that he was denied his Sixth and Fourteenth Amendment rights to present a complete defense when the trial court ruled that defense counsel could not ask Detective Broghamer if appellant was given a *Miranda* warning before speaking with the police.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or the Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Generally, the application of ordinary rules of evidence, such as Evidence Code sections 210 (admission of relevant evidence) and 352 (discretion to exclude evidence), does not impermissibly infringe on the accused's right to present a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 90.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

Thus, the trial court retains wide discretion to limit cross-examination that is repetitive, prejudicial, confuses the issues, or is of marginal relevance. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678–679; see *People v. Ayala* (2000) 23 Cal.4th 225, 301 ["we have repeatedly held that 'not every restriction on a defendant's desired method of cross-examination is a constitutional violation'"].)

The trial court's ruling did not result in the abrogation of appellant's fundamental right to present a defense secured by the federal Constitution. This is so because, as appellant acknowledges, Detective Broghamer described the circumstances of his interviews with appellant and the tape recordings of the interviews were played for the jury. The trial court merely excluded cross-examination on a single point, which did not prevent appellant from arguing that his confession was false.

Appellant's comparison of his case to *Crane v. Kentucky*, *supra*, 576 U.S. 683, is unavailing. In that case, the trial court precluded the 16-year-old defendant from presenting evidence that "he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession." (*Id*. at p. 685.) The Supreme Court held that this was error. (*Id*. at p. 691.) Here, by contrast, the jury heard the evidence regarding the circumstances of the interviews, and heard the recordings of the interviews. There was no constitutional violation.

D. Appellant's Statements Were Voluntary

A criminal defendant's involuntary confession or admission is inadmissible for any purpose. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The test for determining voluntariness is whether the defendant's will was overborne by the circumstances surrounding the confession, taking into account the characteristics of the accused and the details of the interrogation. (*Dickerson v. United States* (2000) 530 U.S. 428, 434.)

"It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for

the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.] The distinction that is to be drawn between permissible police conduct on the one hand and conduct deemed to have induced an involuntary statement on the other 'does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth as represented by the police.' [Citation.] Thus, '[when] the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, 'if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. . . .'" (*People v. Jimenez* (1978) 21 Cal.3d 595, 611–612, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509–510, fn. 17.)

Appellant's argument that the statements he made to the detectives at his house were involuntary is based on his claim that the "interrogation with police was littered with implied promises of leniency as to other crimes and threats that things would be worse for him if he did not confess the full extent of his involvement."

In this regard, appellant cites to several statements made by the detectives at his house: "Hey John, okay Zane was shot, okay, alright and you're not in trouble but we need to know what you know so we can follow up on our investigation. So hipping and hopping, jumping around isn't going to help because obviously you know we know something or else we wouldn't be at your door";"Your best bet is just to tell us the truth, you know"; "We don't care like right now, the last thing on our mind is dope, selling dope, anything like that. All of us here work homicide. [¶] . . . [¶] You kind of got your foot in the door because of what's happened. [¶] . . . [¶] Yeah and I think any cooperation you have with use that [helps] us in our investigation would definitely go with your truthfulness and the whole nine yards"; "John, I don't care if you got freaking 100 lbs on your back patio, all I care about is this investigation right now, okay. So just

be honest with me and tell me everything because that phone, that Michael, that Duke and all the others we talk to are all going to say something, okay and if the saying comes back to something you could easily have fit the puzzle but you avoided just to keep your hands a little cleaner is only going to make you dirtier so just, my partner's been asking you, you just got to fill in. If there is something you did, whatever, tell us now because that's the time to tell us, not when we go click click and drive down to the station, okay"; "[I]f there's anything that you still need to fill in blanks on anything that comes to mind now. Now is your opportunity . . . even [if] there's something that doesn't make you look exactly like the cleanest person, you know. It's like I'd rather hear it from you now [than] later, you know what I mean."

We disagree with appellant that these statements constituted implied promises or threats. There is nothing wrong with the detectives exhorting appellant to tell the truth and to do so at that time. It is common sense that if appellant was untruthful with the police at the beginning of an investigation, he would look bad later. For example, the detectives could testify at trial that appellant lied to them, which would affect his credibility. Contrary to appellant's assertion, the detectives urging him to tell the truth now rather than later, does not constitute either an implied threat that something worse would happen to him if he did not confess right away or an implied promise that he would be rewarded for confessing. Appellant argues that presumably the "click click" comment was a reference to handcuffs and placing him under arrest if he did not confess to the detectives. But read in context, the detectives were saying that they were going to talk to others and would eventually discover the truth and that if appellant was later arrested, it would look bad that he was not initially cooperative. Appellant also argues that the detectives made implied promises that he would be given leniency on any drug charges. But the detectives were clear that they were homicide detectives and that the last thing they cared about "right now" was drugs. Moreover, appellant does not suggest that he possessed illegal drugs or that he was afraid of being charged with drug crimes such that his will was so overborne that he had no choice but to confess. Accordingly,

we conclude that appellant's statements to the detectives at his house were not involuntary.

Appellant's further argument that his subsequent statements at the police station were also involuntary is based on his theory that they were "a product of the earlier involuntary confession at the house." Because we have concluded that these earlier statements were not involuntary, there is no merit to this further argument.

II. LWOP Sentence

Appellant contends there was insufficient evidence of the special circumstance finding such that his LWOP sentence must be reversed. We agree.

A. Standard of Review and Applicable Law

The standard of review on appeal of a criminal conviction based on a claim of insufficiency of the evidence is whether "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212–1213.) This same standard applies to a challenge to the sufficiency of the evidence to support a special circumstance finding. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, *People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25.) The legal sufficiency of evidence to support a conviction is a question of law which the reviewing court reviews de novo. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 316, fn. 3.)

Section 190.2, subdivision (a), allows for a punishment of death, or life in prison without the possibility of parole, if a defendant is found guilty of first degree murder and one of the special circumstances enumerated therein is found true. Murder committed while the defendant was engaged in, or was an accomplice in the commission, or attempted commission of a robbery, is one such special circumstance. (§ 190.2, subd. (a)(17)(A) [robbery].)

When the defendant is not the actual killer in a felony murder, the prosecution must additionally prove that the accomplice either had the "intent to kill" (§ 190.2, subd. (c)), or acted with reckless indifference to human life and was a major participant

in the underlying felony. (§ 190.2, subd. (d)). Here, it was undisputed that appellant was not the actual killer, and the prosecution did not base the special circumstance on the theory that appellant harbored an intent to kill.

Recently, the California Supreme Court in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) addressed the circumstances under which an accomplice who lacks the intent to kill may qualify as a major participant so as to be eligible for a sentence of LWOP or the death penalty. In *Banks*, defendant Matthews was the getaway driver for three confederates, including two fellow gang members, whose attempted robbery of a medical marijuana dispensary in Los Angeles resulted in the shooting death of the dispensary's security guard. (*Banks, supra,* at p. 794.) While his three armed confederates entered the front door of the heavily-guarded dispensary, Matthews waited in a car blocks away for about 45 minutes. (*Id*. at p. 796.) The three men entered the dispensary and "began tying up employees and searching the premises." (*Id*. at p. 795.) After the security guard was shot twice, Matthews picked up two of the three perpetrators. (*Id*. at p. 796.)

Banks concluded that the special circumstance provision did not apply to the evidence presented against Matthews, finding that he was not a major participant in the robbery because "Matthews was absent from the scene, sitting in a car and waiting" and "[t]here was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have prevented it." (*Banks, supra*, 61 Cal.4th at p. 805.) *Banks* also found that Matthews lacked the requisite mental state of reckless indifference to human life. (*Id*. at pp. 810–812.) In reaching its conclusion, *Banks* reviewed two United States Supreme Court cases, *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*) and *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*).

In *Enmund*, the defendant drove his two accomplices to the remote farmhouse of an elderly couple and parked on the side of the road, about 200 yards away, while his accomplices knocked on the back door. When the husband opened the door, one accomplice grabbed him, held a gun to him and told the other accomplice to take his money. Alerted by the husband's cries for help, the wife appeared with a gun and shot

one of the accomplices. One or both of the accomplices returned fire, killing the couple. The accomplices then took the couple's money and fled to the car, where the defendant was waiting to drive them away. The defendant was convicted of first degree felony-murder and sentenced to death. (*Enmund, supra,* 458 U.S. at pp. 784–785.) The Supreme Court reversed the defendant's death sentence, finding the intent to commit armed robbery is insufficient by itself for such a sentence and requires the additional "intention of participating in or facilitating a murder." (*Enmund, supra,* at p. 798.) Thus, a defendant who acts as a getaway driver "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," cannot be constitutionally sentenced to death. (*Id*. at p. 797.)[7]

In *Tison, supra,* 481 U.S. 137, the defendants were brothers who planned and carried out the escape of two convicted murderers from prison, one of whom, their father, was "serving a life sentence for killing a guard in the course of a previous escape." (*Banks, supra,* 61 Cal.4th at p. 802.) The brothers brought a "cache of weapons to prison, arming both murderers," and held guards and visitors at gunpoint. (*Ibid*.) After the successful jailbreak, the getaway car got a flat tire and one of the brothers flagged down a family on the highway. Two of the brothers drove the family into a desert and robbed them at gunpoint while the two murderers deliberated whether the family should live or die. The defendants stood by while the escaped convicts shot all four members of the innocent family, including a toddler. (*Ibid*.) On these facts, the Supreme Court held that the brothers could be sentenced to death because their own personal involvement in the crimes was "'substantial'": "Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each [brother] was actively involved in every element of the kidnapping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight." (*Tison, supra,* at p. 158.)

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[7] *Banks* makes clear that the standards developed in death penalty cases apply equally to cases involving LWOP under section 190.2, subdivision (d). (*Banks, supra*, 61 Cal.4th at p. 804.)

Banks stated that *Tison* and *Enmund* "represent points on a continuum" and that "[s]omewhere between them, at conduct less egregious than the Tisons' but more culpable than Earl Enmund's, lies the constitutional minimum for death eligibility." (*Banks, supra,* 61 Cal.4th at p. 802.) Because section 190.2, subdivision (d) imports the *Tison-Enmund* standard, it permits an LWOP sentence only for those felons who constitutionally could also be subjected to the more severe death penalty. (*Banks, supra,* at p. 804.)

Banks set forth factors that may play a role in determining whether a defendant's culpability is sufficient to make him or her death eligible: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Banks, supra,* 61 Cal.4th at p. 803.)

With respect to the requirement that a defendant must have also acted with reckless indifference to human life, *Banks* noted that this "'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death."'" (*Banks, supra,* 61 Cal.4th at p. 807.) *Banks* noted that the *Enmund* court rejected the argument that the risk of death inherent in an armed robbery justifies the death penalty simply for knowingly participating in such a crime. (*Banks, supra,* at p. 808.) Such an argument would render every felony-murder accomplice death eligible. (*Ibid.*) Thus, a defendant who is aware that his accomplices are armed and that armed

robberies carry a risk of death lacks the requisite reckless indifference to human life; the defendant must knowingly create a grave risk of death. (*Id*. at pp. 808–809.)[8]

B. Analysis

Under the *Banks* factors, there was insufficient evidence that appellant was a major participant in the underlying robbery.[9]

Appellant did not plan the criminal enterprise that led to Zane's death. While it is true that appellant sent texts to Conchas telling him about Zane and to use the name "Rafa" in contacting Zane, these facts do not show that appellant was the mastermind of the criminal enterprise. The prosecution's gang expert testified that Conchas was a ranking member of the Northside Pasadena gang, which is associated with the Mexican Mafia. Appellant was not a gang member. The gang expert testified that it was common for gang members to solicit nongang members for information. It defies common sense and logic to believe that a 19-year-old white nongang member could force a ranking Hispanic gang member to commit a robbery.[10]

Appellant had no role in supplying any firearms.

Appellant repeatedly told Detective Broghamer that he was unaware that any gun was going to be used; at most, he thought that a knife might be used to scare Zane.

Appellant was not present at either the scene of the attempted robbery or the shooting.

Appellant was not aware that Zane had been shot until Detective Broghamer told him the following morning.

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[8] In *People v. Clark* (2016) 63 Cal.4th 522, the California Supreme Court found that the defendant was a major participant in the underlying felony, but lacked the requisite reckless indifference to human life. Thus, the court "conclude[d] that insufficient evidence supports the robbery-murder and burglary-murder special-circumstance findings," and vacated them. (*Id*. at p. 623.)

[9] We recognize that appellant was sentenced prior to *Banks.*

[10] Appellant requests that we take judicial notice of the closing and rebuttal arguments by the prosecutor in *People v. Cabrera, Parra, and Conchas*, No. B263792 (the same prosecutor in appellant's trial), in which he referred to Conchas as the mastermind. We decline to do so, since it is not necessary to our analysis.

In sum, appellant did not plan the crime, did not supply any weapons, was unaware that lethal force would be used, was not present at the scene, and was unaware that the victim had been shot. His conduct was nowhere near that of the defendant brothers in *Tison* and was more akin, but even less so, to the getaway driver in *Enmund*. Under the circumstances here, there was insufficient evidence as a matter of law that appellant was a major participant in the robbery.

Additionally, there was insufficient evidence as a matter of law that appellant had a reckless indifference to human life. Appellant repeatedly told Detective Broghamer that he thought the plan was merely to scare Zane into turning over his marijuana. There was no evidence appellant knew that a gun would be used. At most, the evidence showed that appellant thought a knife might be used in the robbery. While appellant was aware that Conchas, as a gang member, had guns, this fact does not increase appellant's culpability. As *Banks* confirms, even a defendant who knows that his confederates are planning an *armed* robbery lacks the requisite reckless indifference to human life. (*Banks, supra*, 61 Cal.4th at p. 809; *People v. Clark*, *supra*, 63 Cal.4th at p. 618 ["The mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life"].) Because appellant was not present at the scene, he did not see that Conchas had a gun or have any opportunity to stop Conchas or Conchas's fellow gang members from using a gun.

Based on the evidence in the record, no rational trier of fact could have found appellant's conduct supported a felony-murder special circumstance. Accordingly, the jury's special circumstance true finding and the accompanying LWOP sentence cannot stand. The case is remanded for resentencing on count 1.[11]

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[11] In light of our conclusion that the LWOP sentence must be vacated, appellant's additional argument that the LWOP sentence is cruel and unusual punishment is now moot.

III. Ineffective Assistance of Counsel

Appellant contends that his trial counsel rendered ineffective assistance of counsel by failing to present the defense of duress.

A. Relevant Proceedings

Defense counsel proceeded on the defense that appellant was not guilty of attempted robbery, conspiracy to commit robbery and the special circumstance allegation because the crime that occurred was a gang hit, not a robbery gone bad. Defense counsel argued that Conchas, Cabrera and Parra always intended to kill Zane as a "hard candy" gang hit for his failure to pay taxes to the gang. Defense counsel told the jury that the "robbery aspect of this, that was nothing more than a charade to induce my client and Mr. Lacey to take part in this. Because they couldn't tell them that they planned on killing Zane because then he never would have cooperated."

While the jury was instructed on the defense of duress (CALJIC No. 4.40),[12] defense counsel never argued the defense of duress to the jury. The jury did hear appellant's taped interview with Detective Broghamer at the police station in which appellant claimed that Conchas threatened to shoot him and his family if he did not provide Conchas with the contact information for Zane. Appellant stated that he was in Conchas's car when Conchas made the threat; Conchas pulled out a gun and placed it between the two front seats. When Detective Broghamer asked appellant, "Were you . . . in fear that they were going to do something— [¶] . . . [¶] —to you or your family," appellant responded, "Yes. [¶] . . . [¶] . . . that's why I did it." "I know he has guns and

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[12] The jury was instructed with CALJIC No. 4.40 "DURESS—THREATS AND MENACES" as follows:

"A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

"1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and

"2. If this person then actually believed that his life was so endangered.

"This rule does not apply to threats, menaces, and fear of future danger to his life, nor does it apply to the crime of murder. However, in the case of felony murder, this rule does apply to the underlying felony."

I know he has people that—that, you know. [¶]. I know he has people, they're in gangs. . ." Later in the interview, appellant stated: "He did, like I said, he [Conchas] did not point the gun at me, he said 'If you do not give me the information on Zane I will shoot you and your family. I know where you live . . . so if you . . . try to do anything fishy or anything crazy happens, you know, I'm coming after you.'" After Conchas's threat, appellant got together with Lacey to gather the information Conchas requested.

B. Applicable Law

In *People v. Weaver* (2001) 26 Cal.4th 876 (*Weaver*), the California Supreme Court reiterated the standard for evaluating ineffective assistance of counsel claims:

"'"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*Weaver, supra*, at p. 925.) "'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."'" (*Ibid*.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. [Citations.]" (*Id*. at p. 926.)

"Duress is an effective defense only when the actor responds to an immediate and imminent danger. '[A] fear of future harm to one's life does not relieve one of responsibility for the crimes he commits.' [Citations.] The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent." (*People v. Heath* (1989) 207 Cal.App.3d 892, 900; *People v. McKinney*,

(1986) 187 Cal.App.3d 583, 587 ["The courts have long recognized that duress is only an effective defense when the actor responds to an immediate danger; 'a fear of future harm to one's life does not relieve one of responsibility for the crimes he commits'"].)

C. Analysis

Here, appellant could not meet the requirements of the defense of duress, even though the jury was instructed on that defense. When Conchas allegedly threatened to kill appellant and his family, appellant was not in *immediate* danger, because Conchas needed appellant to obtain the information about Zane. Conchas allegedly threatened to harm appellant in the future. A fear of *future* retribution does not support a claim of duress. Indeed, after parting ways with Conchas, appellant had time to call the police and warn his family and Zane, but he chose instead to commit a crime with Conchas and his cohorts. Additionally, appellant's contact with Conchas on the day of the shooting raises the inference that appellant was not in fear of his life. There were three calls made from appellant's cell phone to Conchas's and appellant texted Conchas asking, "What's good?" If appellant had truly been in fear of Conchas, he likely would have avoided any further contact with him.

Because the facts of this case did not warrant or support a defense of duress, defense counsel's representation did not fall below an objective standard of reasonableness under prevailing professional norms. By the same token, because the evidence pertaining to duress was so weak, appellant cannot show there was a reasonable probability that, but for defense counsel's claimed error, the outcome of the case would have been different.

Accordingly, appellant's claim of ineffective assistance fails.

IV. Postconviction *Marsden* Motion

Appellant contends the trial court abused its discretion in denying his postconviction *Marsden* motion. We disagree.

A. Relevant Proceedings

On the day set for sentencing, appellant requested that he be appointed new counsel. The trial court held a *Marsden* hearing outside the presence of the prosecutor.

The court began by asking appellant why he wanted a new attorney. Appellant responded that his "main concern" was defense counsel's inability to hear, stating that over the past two years there had been "major communication problems" with defense counsel, and "several times where he can't hear me or he can't understand certain things." Appellant stated that his second concern was "signs of memory loss": "When we talk he would forget names and key elements in the case. I believe that he suffers from dementia. And it's hard for him to remember things in certain details sometimes. [¶] For instance, we've talked about a couple of things and—and we've agreed that he would bring that up and it was never brought up." When the trial court asked if there was anything else he wished to say, appellant responded, "No, your Honor."

Defense counsel conceded he had a hearing problem: "I have upgraded my hearing aids this past year from the ones that I was using that were 9 years old. And, yes, I did miss a few things when we were talking, but we are talking over a telephone in the county jail and my hearing aids at that time did not have the ability to amplify the voice coming over the phone well enough for me to understand what he was saying unless he was talking directly into the microphone. And I had to remind him to do that on several occasions. [¶] But I now have a program that permits the phone itself to enhance the volume of the telephone so that that's no longer a problem. [¶] As to the dementia thing, I have to strongly disagree based on my own experience. I have not experienced any memory loss that I'm aware of."

The trial court then stated the following about defense counsel: "I've known your lawyer for a lot of years. He has been licensed for a long time. I have been licensed a long time. I think he beats me by a year, maybe six months. [¶] As far as the hearing, there is a couple of times during the proceedings that he asked me to repeat myself, not much, because he hears me, and a couple times he asked the jurors or the witness [to] repeat himself. That's standard. [¶] As far as dementia, he is not demented in one way or any way shape or form. [¶] His written authorities—and he has filed two motions which I'm going [to] hear this morning—his written authorities are nothing short of

extreme lawyer-like papers. [¶] He is—if he has not taken offense of being labeled demented, but if he did, I would not blame him. He is not demented at all."

The court then cited two cases for the proposition that counsel is in charge of all tactical decisions and continued, "[defense counsel] runs this trial, not you. And if he didn't do something or if he did something that you disagree with, it's his tactical choice. [¶] You could not get a better lawyer than [defense counsel]. I understand that you are not pleased with the results. Nobody that loses a trial is pleased with the result, but this is not [defense counsel's] fault. Your motion to replace [defense counsel] with other counsel is denied."

B. Applicable Law

The Sixth Amendment guarantees a criminal defendant the right to be represented by counsel at all critical stages of the prosecution. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Sentencing is a critical stage of the proceedings. (*Ibid.*; *People v. Smith* (1993) 6 Cal.4th 684, 694 ["*Marsden* and its progeny applies equally preconviction and postconviction"].)

A defendant who asserts his trial counsel provides inadequate representation, and seeks to discharge counsel and have new counsel appointed, must be given the opportunity "to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance." (*People v. Roldan* (2005) 35 Cal.4th 646, 681; *Marsden, supra,* 2 Cal.3d at p. 124 ["a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney"].)

A court must grant a defendant relief if the record clearly shows either that: (1) "'the first appointed attorney is not providing adequate representation;'" or (2) "'defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*People v. Roldan, supra,* 35 Cal.4th at p. 681.) The trial court is vested with the discretion to grant or deny the request for substitution and there is no abuse of discretion "unless the failure to remove appointed

counsel and appoint replacement counsel would 'substantially impair' the defendant's right to effective assistance of counsel." (*Ibid*.)

C. Analysis

Appellant argues the trial court abused its discretion in denying his *Marsden* motion for two reasons: "First, appellant described for the court problems in his communication with [defense counsel], *outside of the courtroom*, suggesting that his communication with defense counsel had been compromised going back two years, including his understanding of the players in the case and his preparation and presentation of his defense leading up to trial. Second, the trial court personally vouched for defense counsel's performance and noted its own observations of counsel's performance *inside the courtroom* . . . ."

With respect to the communication and hearing issues outside the courtroom, defense counsel explained that if appellant did not speak directly into the jail telephone's microphone, counsel had a hard time hearing appellant. Counsel made clear, though, that he could fully hear appellant if appellant used the jail telephone properly, and when appellant did not, counsel reminded him to do so. While this undoubtedly caused discussions to last longer and appellant to feel frustrated, it does not indicate a complete breakdown in communications giving rise to ineffective assistance or an irreconcilable conflict. Additionally, appellant did not identify any particular issues that defense counsel agreed to raise but did not, despite being given any opportunity by the trial court to do so.

With respect to defense counsel's conduct inside the courtroom, appellant has not identified any particular issues demonstrating ineffective assistance. Appellant points to specific instances of times when he thought his counsel might not have heard something, but his counsel said nothing. Appellant's assertion that his counsel might not have heard everything going on is merely speculation. Indeed, the only claim of ineffective assistance of counsel raised in the instant appeal is defense counsel's tactical decision not to argue the defense of duress, which appears to be unrelated to any hearing issues. While the trial court did express praise of defense counsel, the court did not base its

denial of the *Marsden* motion solely on its own observations of counsel in the courtroom. The court gave appellant a full opportunity to explain his reasons for wanting new counsel.

Notably, appellant failed to seek new counsel during trial; he only asked for new counsel after the jury returned unfavorable verdicts against him. It is understandable that appellant was dissatisfied with the result, but appellant's frustration with the outcome does not support his *Marsden* claim.

At the time appellant sought new counsel, the trial had been completed, and defense counsel's remaining duty was to represent appellant at sentencing. Thus, appellant's *past* issues with counsel's hearing were irrelevant. Defense counsel had filed a sentencing memorandum and a motion for a new trial before the *Marsden* hearing. Appellant suggests that new counsel might have filed a different motion for new trial, but he does not indicate how it would be different or more successful. In his sentencing memorandum, defense counsel argued that a mandatory LWOP sentence was cruel and unusual punishment, a claim appellant also raises on appeal. Thus, defense counsel was still forcefully advocating for appellant. A *Marsden* motion is prospective in nature; it raises the issue of "whether the continued representation by an appointed counsel would substantially impair or deny the right to effective counsel." (*People v. Dennis* (1986) 177 Cal.App.3d 863, 870; see also *People v. Smith*, *supra*, 6 Cal.4th at p. 696.) Appellant has failed to demonstrate how he was prejudiced going forward. His claim of error is rejected.

DISPOSITION

The special circumstance true finding and LWOP sentence are vacated. The matter is remanded for resentencing on count 1. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT